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No. 06-329

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE DUFF; LINDA DUFF,
Petitioners,

vs.

RICHARD W. LEWIS, Ph.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR REHEARING

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PETITION FOR REHEARING

I. INTRODUCTION

The Petitioners respectfully submit this case produces extremely serious constitutional violations that has change the federal statute giving rise to an action for redress under *42 U.S.C. §1983* that now sets a false precedent by the Ninth Circuit Court of Appeals that changed the *Civil Rights Act*, which can only be changed by an act of Congress. This now requires this Court, which is bound by oath, to exercise its judicial discretion in support and defense of the Constitution and the *"Rule of Law"*.

II. STATEMENT OF FACT

Plaintiff brought this action for redress under *42 U.S.C. §1983* before the United States District Court, District of Nevada, where he alleged the State Defendants initiated a conspiracy with the Duff Defendants to violate his civil rights under color of State law. The district court's order, filed July 12, 2001 pursuant to *N.R.S. 41.031*, dismissed all the State Defendants with prejudice, which dismissed the Plaintiff's cause of action under color of State law, including against the Duff Defendants, with prejudice.

The district court acted in the face of clearly valid statutes and case law expressly depriving it of jurisdiction for its issuance of its order and default judgment, entered January 30, 2004 that awarded compensatory and punitive damages in the amount of $330, 000.00 against the Duff Defendants in favor of the Plaintiff for - 1) the loss of Western Counseling Services, LLC contract with the State of Nevada; 2) loss of income on the sale of Western Counseling Services, LLC.; and 3) the loss of the Plaintiff's forensic business due to the alleged private conduct of the Duff Defendants, none of which states a protect constitutional interest/right and therefore are inadmissible in the Plaintiff's *Section 1983* action.

The Ninth Circuit's Memorandum and Judgment condoned the district court's issuance of two (2) judgments, over eighteen (18) months apart that directly contradict each other, where the district court's first order and judgment, entered July 8, 2002 clearly represents the Plaintiff's action for redress under *42 U.S.C. §1983* and its second order and default judgment, entered January 30, 2004 represents a common law action, which fails to state a protected constitutional interest/right and therefore is inadmissible in the Plaintiff's *Section 1983* action.

The Ninth Circuit's failure to address each of the district court's judgments has changed the *"Civil Rights Act"* to include common law claims on behalf of, including but not limited to, corporations in the Plaintiff's *Section 1983* action, in direct violation of the Constitution and the *"Rule of Law"*.

The Ninth Circuit's Memorandum and Judgment cannot remain unchanged, when it reversed and remanded the Duff Defendants back in the Plaintiff's *Section 1983* action for sanctions to be imposed against them that arises from the district court's order and default judgment, entered January 30. 2004, which failed to state a protected constitutional interest/right and therefore failed to comply with the requirements for an action for redress under *42 U.S.C. §1983.*

III. ARGUMENT

The Ninth Circuit's Memorandum and Judgment, entered May 1, 2006, contradicts and overturns its own well established case law in *Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977), where it held, "the 'color of state law' requirement is the equivalent of the 'state action' element of the *Fourteenth Amendment*; thus *section 1983* is not invoked by purely private conduct. *In re First T.D. & Investments, Inc.*, 253 F.3d 520, 532 (9th Cir. 2001)(citing *Frow v. De La Vega*, 82 U.S. 522 (1872), "[it] would be incongruous and unfair to allow [the plaintiff] to collect a half million dollars from [the defaulting defendants] on a contract that a jury found was breached by [the plaintiff]."

When the district court dismissed all State Defendants, with prejudice, there was no longer a cause of action under color of State law remaining in the Plaintiff's action for redress under *42 U.S.C. §1983.* The record itself establishes the fact the district court never entered sanctions against the Duff Defendants.

Section 1983 does not create any substantive rights; rather it is the vehicle whereby the Plaintiff can challenge actions by governmental officials. Here, all the State Defendants were dismissed, with prejudices as the prevailing parties. The primary inquiry in a *Section 1983* analysis is whether the Plaintiff has articulated a Constitutional right giving rise to a claim under this statute. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). The district court's order and default judgment, entered January 30, 2004, failed to comply with the requirements for an action for redress under *42 U.S.C. §1983*, where the Plaintiff failed to show an actual deprivation of a federal constitutional right under color of State law.

Plaintiff's common law claims are not only inadmissible in a *Section 1983* action but are timed-barred, pursuant to *N.R.S. 11.190(4)(e)* two year limitations period for personal injury claims and are barred by the *doctrine of res judicata*, where the Board's Findings of Fact, Conclusion of Law and Order, entered July 20, 1995, on his disciplinary hearing has never been overturned and the Plaintiff did not appeal.

Section 1983 actions may be brought to redress constitutional violations effect under color of state law. A private party may be considered to have acted under color of state law when it engaged in a conspiracy or acts in concert with state agents to deprive one's constitutional rights. *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156-57, 16 L.Ed.2d 267, 272 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142, 151 (1970); *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1341-42 (9th Cir. 1977); *Briley v. California*, 564 F.2d 849, 858 (9th Cir. 1977); *Rankin v. Howard*, 633 F.2d 844, 850 (9th Cir. 1980), cert. denied, 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981).

The court's decision in *Howerton v. Gabica*, 708 F.2d 380 (1983) offers additional insight into the conduct necessary to satisfy *Section 1983's* acting under color of law requirement.

The Plaintiff failed to produce any of the requirements necessary to maintain an action for redress under *42. U.S.C. §1983* against the Duff Defendants after all the State Defendants were dismiss, with prejudice.

In *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965), "the essential elements for establishing a claim for damages under the *Civil Rights Act (42U.S.C. §1983)* are "conduct complained engaged in 'under color of state law', and such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution of the United States."

The district court agreed with the State Defendants that the Plaintiff failed to produce the essential elements to established a claim for damages under *42 U.S.C. §1983* and therefore dismissed all the State Defendants, with prejudice as the prevailing parties.

It is legally impossible for the State Defendants and the Plaintiff both to be the prevailing parties in this *Section 1983* action and a default judgment to be entered against the Duff Defendants, where it is legally impossible for them to act under color of State law with no State actors. Relying on *Haldane v. Chagnon*, the District Court also ruled that the dismissal of the judge, the remaining defendants could not be said to have conspired under color of state law within the meaning of *1983.*

In a per curiam opinion, a panel of the Court of Appeals for the Fifth Circuit affirmed, agreeing that the judge was immune from suit and that because "the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid 1983 suit can be stated," *Sparks v. Duval County Ranch Co.*, 588 F.2d 124, 126 (1979), existing authorities in the Circuit required dismissal of the claims against these defendants as well. [1]

The district court continued to act in the face of clearly valid statutes and case law expressly depriving it of jurisdiction, when it continued to litigate in the Plaintiff's *Section 1983* action against the Duff Defendants, with no State Defendants and therefore no cause of action under color of State law and entered its order and default judgment on common law claims against them in favor of the Plaintiff and Western Counseling Services, LLC. This changed the *Civil Rights Act,* where the district court held a *Section 1983* action can be invoked by purely private conduct alone when it held the State Defendants and the Plaintiff are both the prevailing parties and the Ninth Circuit concurred.

The Supreme Court held in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944), that this deception demanded the exercise of the courts' equitable power to vacate the judgment of the lower court to prevent a fraud upon the court itself. "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated consistently with the good order of society". The Court emphasized, "This is not simply a case a judgment obtained with the aid of a witness who, on the basis of after discovery evidence, is believed possibly to have been guilty of perjury. Here . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245.

The record itself establishes the fact, the Plaintiff's complaint before the district court was for redress under *42 U.S.C. §1983.* When the district court filed its order and

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[1] *Slavin v. Curry,* 574 F.2d 1256 (1978); *Perez v. Borchers,* 567 F.2d 285 (1978); *Humble v. Foreman,* 563 F.2d (1977); *Hill v. McClellan,* 490 F.2d 859 (1974); *Guedry v. Ford,* 431 F.2d 660 (1970).

default judgment, January 30, 2004, on common law claims, it changed the federal statute giving rise to an action for redress under *42 U.S.C. §1983*, which governs deprivation of civil rights, creates separate federal right, that is special statutory claim independent of common law. *Cook v. Cox*, (1973 DC Va.) 357 Supp. 120.

The Ninth Circuit's Memorandum acknowledges the district court dismissed the Plaintiff's cause of action under color of State law, when it dismissed all State Defendants, with prejudice. In *Frow v. Del Vega*, 82 U.S. 522 (1872), the principle should be applied where the defendants have been alleged only as jointly liable. When two or more obligors are alleged jointly, it means that they are "undivided" and "must therefore be prosecuted in a joint action against them all. *Black's Law Dictionary* 837 (6th ed. 1990). Because the liability cannot be divided, the matter can be only be decided in a like manner as to all defendants. Therefore, if one is liable, then all must be liable, and if one is not liable, then all are not liable. *Harlow v. Voyager Communications V, Inc.*, 127 N.C. App. 623, 492 S.E. 2d 45 (1997).

The Ninth Circuit, by its own admission, states the district court lacked subject matter jurisdiction for the issuance of its order and default judgment, entered January 30, 2004, awarding $330,000.00 against the Duff Defendants in favor of the Plaintiff that it now holds are "sanctions" rather than compensatory and punitive damages, where the record of the case itself establishes the fact, sanctions in the amount of $330,000.00 was never raised before the district court below and can not be raised for the first time in this appeal. *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997)(citing *Vargas v. INS*, 831 F.2d 906, 907-08 (9th Cir. 1987)("failure to raise an issue below constitutes failure to exhaust administrative remedies and 'deprived this court of jurisdiction to hear the matter.").

The United States Supreme Court held that no sanction or penalty shall be imposed upon one because of his exercise of constitutional rights. *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967); *Garrity v. New Jersey*, 385 U.S. 493, 87 17 S.Ct. 616 (1967); *Boyd v. United States*, 116 U.S.616, 6 S.Ct. 524 (1886); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Sherar v. Cullen*, 481 F.2d 945 (1973). There was no sanctions in the district court's order and judgment, entered July 8, 2002 nor were there any in its order and default judgment, entered January 30, 2004.

The fact the Ninth Circuit's Memorandum address $330,000.00 as sanctions establishes it altered the district court's order and default judgment from compensatory and punitive damages to sanctions after it discovered it was legally impossible for the Plaintiff to prevail on the merits, where all the State Defendants were dismissed with prejudice as the prevailing parties.

Some rights are so clearly established that case law is not necessary. Such is the case here, where all the State Defendants were dismissed with prejudice, which dismissed the Plaintiff's cause of action under color of State law in his *Section 1983* action. This dismissed the Duff Defendants, with prejudice, where they are without lawful authority to act under color of State law without a State actor and therefore it is impossible for them to of deprive the Plaintiff of any federal constitutional right under color of State law.

The Eleventh Circuit has expressly stated in *Rowe v. Fort Lauderdale*, 2002 U.S. App. 885, *19n. 10, 15 Fla. Weekly Fed. At C241 n. 10 (11th Cir. 2002): "Case law is not always necessary to clearly establish a right. A right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official. Also, a general constitutional rule set out in preexisting case law may apply with obvious clarity to the

specific circumstances facing the official. The official's conduct may be so egregious that an objective and reasonable official must have known it was unconstitutional even without any fact specific case law on point."

Should this court deny the Duff Defendants' petition for rehearing, the Ninth Circuit's judgment below remains unchanged, which would be a manifest of injustices, where its judgment is in direct violation of the Constitution and the *"Rule of Law"* that has changed the federal statutes giving rise to an action for redress under *42 U.S.C. §1983.*

This Court is bound by oath to exercise its judicial discretion and intervene in this matter in support and defense of the Constitution and the *"Rule of Law"*, where the Ninth Circuit's Memorandum and Judgment has changed a federal statute by commingling the Plaintiff's action for redress under *42 U.S.C. §1983* with common law claims in order to reverse and remand the Duff Defendants back with no State Defendants and no cause of action under color of State law remaining in the Plaintiff's *Section 1983* action and enter sanctions against them that were never raised before the district court below that has now changed the *Civil Rights Act* that can only be changed by an act of Congress.

IV. CONCLUSION

Based on the foregoing, the Petitioners request that their Petition for Rehearing be granted.

Respectfully submitted,

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Certification of Counsel (Rule 44)

Pursuant to Rule 44 of the Rules of the Supreme Court of the United States, we hereby certify that the instant petition for rehearing is presented in good faith and not for delay.

Dated:

_____

Tyrone Duff
Counsel of Record for Petitioners